

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Overnite Transportation Company and Teamsters Local 667, affiliated with the International Brotherhood of Teamsters and Tommy George and Mark Cole and Tollie Graves and Marcus Cole and Anthony Q. Pope. Cases 26–CA–17397, 26–CA–17520, 26–CA–17568, 26–CA–17655, 26–CA–17722, 26–CA–17723, 26–CA–17727, 26–CA–17761-1, 26–CA–17857, 26–CA–17881, 26–CA–17884, 26–CA–17916, 26–CA–17995, 26–CA–18004, 26–CA–18031, 26–CA–18040, 26–CA–18053, 26–CA–18068, 26–CA–18069, 26–CA–18071, 26–CA–18099, 26–CA–18104, 26–CA–18109, 26–CA–18165, 26–CA–18388, 26–CA–18438, 26–CA–18460, and 26–CA–18348

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND TRUESDALE

On November 13, 1998, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions, as modified.²

We agree with the judge's findings, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Tollie Graves and Marcus Cole, and by reducing Horace Quinn's hours the day after the election, but that it did not violate the Act by discharging Quinn.³ However, we

¹ The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We will modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997), and our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (Aug. 24, 2001).

³ In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by threatening employees with reduced hours if they voted in favor of union representation.

reverse the judge's findings that the Respondent's implementation of more stringent loading dock policies was lawful. We also reverse his finding that the General Counsel failed to meet his initial burden of establishing that the discharges of Sidney Wyrick, Steve and Anna Spillers, and Mark Cole were unlawfully motivated, and we remand these allegations for further consideration.

Background

The Union first attempted to organize the employees at the Respondent's Memphis City and Hub facilities in 1995, but was not successful. It conducted another organizing campaign the following year, and on September 16, 1996, an election was held among the city drivers, road drivers, dock workers, jockeys/hostlers, building maintenance employees, and shop employees at the facilities. The results were 219 for and 201 against the Union, with determinative challenged ballots. Both parties filed objections. The issues in the representation case were subsequently resolved, and the Union was certified as the exclusive collective-bargaining representative of the above-described employees on October 9, 1997.

More Stringent Dock Policy

In June 1996, during the second organizing campaign, Michael Eastman was transferred to Memphis to become the facility's Assistant Terminal Manager. Seven months after the election, on April 15, 1997, Eastman announced to dock employees that they must count their freight and "do what they're supposed to do" or "we're going to run your ass off." He also told employees that no more than three misloads or shortages would be tolerated.⁴ There is no dispute that the Respondent did not confer with the Union before making this April announcement to employees.

The judge found that at the time that the Respondent announced its new standards, it had no obligation to notify or bargain with the Union because the Union had not yet been certified as the employees' collective-bargaining representative. The General Counsel has excepted to the judge's failure to find that the Respondent's

No party excepted to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discriminatorily discharging city driver Robert Crawford. On June 30, 1999, the Board administratively granted counsel for the General Counsel's unopposed Motion to Sever Cases 26–CA–18031, 26–CA–18053, and 26–CA–18071 to the extent that they relate to Crawford's discharge.

⁴ A misload is when freight unloaded from one trailer is inadvertently reloaded onto the wrong out-bound trailer. Sam Powell, a 19-year employee, and Paul Allen Holder, a 17-year employee, testified that misloads are a frequent occurrence and that they happen daily. The parties stipulated that misloads, shortages, low productivity, and failures to document hazardous material were dock errors that gave rise to discipline.

unilateral implementation of the stringent dock rules violated Section 8(a)(5).

It is well-settled that absent compelling circumstances, an employer that chooses unilaterally to change its employees' terms and conditions of employment between the time of an election and the time of certification does so at its own peril, if the union is ultimately certified. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), reversed and remanded on other grounds, 512 F.2d 684, (8th Cir. 1975). See also *NLRB v. 1199, National Union of Hospital & Health Care Employees*, 824 F.2d 318 (4th Cir. 1987); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984); and *Celotex Corp.*, 259 NLRB 1186, 1993 (1982). The purpose of the rule is to prevent employers from postponing their bargaining obligation through dilatory tactics and spurious objections, and from gaining unfair advantage prior to the commencement of bargaining. Thus, if the election objections prove to be fruitless and the union is certified as the employees' collective-bargaining representative, an employer that has unilaterally changed terms and conditions of employment will be found to have violated the Act.

Here, the alleged unilateral change in the dock policy occurred in April 1997, between the September 1996 representation election and the October 9, 1997 certification. The Respondent contends, however, that no new dock policy was implemented in April 1997, and suggests that it merely reiterated an existing policy, i.e., the progressive discipline policy that Eastman implemented in 1996. Consequently, it argues, the General Counsel is precluded by Section 10(b) of the Act from litigating this matter as an unfair labor practice.⁵ The Respondent also argues that the employees had been similarly "lectured" in the past.

The parties do not dispute that in June 1996, Eastman announced the institution of a progressive discipline policy. The legality of the progressive discipline policy was not in issue, and contrary to the Respondent's assertions, the judge made no findings about it apart from noting its institution. Eastman testified variously about the 1996 discipline policy, first stating that it was based on a five-step progression (oral counseling, written counseling, written warning, final written warning with suspension, and termination), and then suggesting that it was a four-step process, (written counseling, written warning, final written warning with suspension, and termination).

Eastman's April 1997 statement that no more than three misloads or shortages would be tolerated was at least one and arguably two fewer mistakes than would have

been tolerated under the June 1996 discipline policy. Thus, the dock policy was changed to allow fewer mistakes before termination. As a different policy, it could not be implemented unilaterally under *Mike O'Connor Chevrolet* and its progeny.

Moreover, employee Frederick Clark testified that the employees on the midnight shift who attended an April 1997 meeting where the more stringent dock policy was announced all had to sign "a little sheet that they passed around... stating [the employees] were aware of the shortage and damage" policy. While employees may previously have been advised to reduce the number of mistakes on the dock, the Respondent presented no evidence that it had required employees to sign their acknowledgment at similar "lectures" or that the lecturing amounted to imposition of an enforceable policy. The fact that such an acknowledgment was required of the employees further supports our finding that Eastman's April 1997 announcement represented a substantive change in the existing policy and practice. Cf. *Albertson's, Inc.*, 319 NLRB 93, 103 (1995) (issuance of a memorandum was itself an indication of a change in past practice).

Finally, the record contains disciplinary records of dock employees demonstrating that the Respondent did not enforce the 1996 progressive disciplinary policy in a consistent manner. Claims Supervisor Dale Watson, who issued a significant number of the counselings and warnings that dock employees received, admitted that he did not follow the progressive disciplinary policy. Thus, even if, as the Respondent asserts, it was merely enforcing the 1996 discipline policy, Eastman's remarks represented a change in the enforcement of the policy. See, *Caterpillar, Inc.*, 321 NLRB 1178, 1182 (1996), vacated pursuant to a settlement dated March 19, 1998⁶ (departure from prior practice of lax enforcement), and *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989), enf'd, 939 F.2d 361 (6th Cir. 1991) (change from lax, sporadic enforcement to more stringent enforcement).⁷

For these reasons, we conclude that the Respondent instituted a more stringent dock policy in violation of Section 8(a)(5) and (1).

⁶ See 332 NLRB No. 101 (2000).

⁷ In its answering brief, the Respondent states that in mid-1997 Eastman conducted a review of discipline under the progressive discipline policy, but contends that the review did not result in "increased enforcement." However, the Respondent unsuccessfully defended the 8(a)(3) discharges of dock employees Marcus Cole on July 15, and Tollie Graves on November 3, 1997, by contending, among other things, that it merely had enforced the progressive discipline policy. Thus, increased enforcement did result from Eastman's review.

⁵ Sec. 10(b) precludes issuance of a complaint based on conduct that occurred more than 6 months prior to the filing of an unfair labor practice charge.

The Discharges of Spillers, the Wyricks, and Cole

Road drivers Steve Spillers and Sidney Wyrick and Dispatcher Mark Cole were discharged in June 1997. Spillers and Wyrick were terminated ostensibly for falsifying their log books by omitting a run to Nashville on May 21 that put them in excess of the maximum consecutive working hours allowed by Department of Transportation (DOT) regulations. Cole was discharged for dispatching them on that run.⁸ Anna Wyrick, Sidney Wyrick's wife, was terminated along with her husband. She had been employed by the Respondent since 1994 with the understanding that she would only be required to drive as a team with her husband.

At the close of the General Counsel's case, by order dated June 26, 1998, the judge granted the Respondent's motion to dismiss the 8(a)(3) allegations relating to the discharges of these individuals. The judge did so on the ground that the General Counsel had failed to establish any nexus between the Respondent's antiunion animus and the discharges.⁹

Contrary to the judge, we find that the General Counsel presented sufficient evidence to establish such a nexus. We shall therefore remand this part of the case to the judge for further proceedings.¹⁰

The record reveals that 6 weeks after the September representation election, the Respondent laid off approximately 37 to 40 drivers. Allegations that the layoffs violated Section 8(a)(3) and (5) were consolidated with the instant cases, but were settled at the commencement of the unfair labor practice hearing. Among the drivers laid off was Johnnie Mangum, an outspoken advocate of the

Union since the 1995 organizing effort, who was on the in-plant organizing committee, wore union hats and badges, passed out leaflets at the gate, and talked to people about supporting the Union. Mangum was recalled to work on May 1, 1997.

Three weeks later, on May 21, Mangum was at the Memphis facility when Spillers and Sidney Wyrick, driving as a team, returned from Fontana, California, a 30-hour trip. Spillers and Wyrick were informed that their next load, for a trip from Memphis to Houston, was delayed several hours.¹¹ The two asked Linehaul Supervisor Richard Pair whether he had another run they could make in the interim. A short time later when Cole entered Pair's office saying he needed someone to pick up two loads in Nashville, Pair told Cole to use Spillers and Wyrick. Cole pointed out that the two had just come in from California and asked whether he should dispatch them as single drivers or as a team to Nashville. Pair told Cole to send them out singly, and selected a second truck for Spillers to use. When Spillers pointed out that he and Wyrick could not legally log the trip, Pair told them, "you don't never log this anyway." Cole questioned Pair again about the drivers' hours before dispatching Spillers and Wyrick, but Pair told him not to worry about it. Spillers and Wyrick then drove separately to Nashville where they picked up freight and brought it back to Memphis before heading to Houston as a team. In their log books, instead of recording the Nashville run, they indicated they were resting, a violation of DOT regulations and the Respondent's rules.

Mangum saw Spillers and Wyrick in Nashville, where he stopped for repairs en route to Lexington, Kentucky. Knowing that they had just completed a California to Memphis run, and surmising that they were being dispatched in violation of hours, he recorded their truck numbers. When Mangum returned to Memphis, he reported the matter to Terminal Manager Danny Warner and Pair, who denied dispatching drivers who did not have hours available. Over the course of the next week, Mangum collected information relating to Spillers' and Wyrick's Nashville run.

On May 29, Eastman and Regional Dispatch Manager Paul Stenback conducted a meeting which drivers attended. At the meeting, Mangum asked why the Respondent was "aiding and abetting" the dispatch of drivers in violation of DOT regulations when other drivers were still on layoff.¹² Eastman denied that illegal runs were dispatched from the terminal. At the close of the

⁸ Pursuant to the relevant DOT regulations, drivers may not exceed 10 hours driving time, must have 8 hours rest, and must record both driving and rest times in their logs. Drivers must also log stops lasting more than 15 minutes, e.g., tire checks, road repairs, and similar matters.

⁹ JDO(ATL)-07-98. The judge did not make explicit credibility resolutions in reaching his determination, but rather relied on undisputed facts and evidence considered "in a light most favorable to the General Counsel." Both the judge's recitation of facts, and ours, is based on the testimony of Spillers, Sidney Wyrick, Cole, Mangum, and driver Paul Holder.

¹⁰ Despite dismissing the allegations at the close of the General Counsel's case, the judge later found, in essence, that the Respondent had rebutted the General Counsel's case under the standards set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 622 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Thus, the judge found that, even if the discharges were motivated in part to undermine the Union, the record established that the Wyricks, Spillers and Cole would have been discharged regardless of that motivation.

We give no weight to these additional findings. Given the dismissal of the allegations prior to the close of the hearing, the parties did not have the opportunity to fully litigate the Respondent's defenses. Nor did the parties address them in their posthearing briefs. We therefore direct the judge to reconsider these issues on remand, after the parties have had a full opportunity to litigate and brief them.

¹¹ Spillers and Wyrick's normal route was a roundtrip from Memphis to Fontana, California, followed by a roundtrip run to Houston.

¹² At the time Mangum was recalled, at least 10 other drivers remained on layoff.

meeting, Mangum showed him copies of dispatch documents that proved the Spillers and Wyrick had made an out-of-hours run to Nashville.

After further investigation by the Respondent's managers, Eastman terminated Spillers, Wyrick, and Cole. Respondent took no action against Pair, however.¹³

As the judge correctly stated, the General Counsel's theory of the alleged violation was not that the Respondent harbored animus toward Spillers, Wyrick and Cole, but rather toward Mangum and the employees' union representation effort as a whole. Specifically, the General Counsel's theory was that the Respondent discharged these employees in order to undermine the Union, by creating the appearance that leading union activist Mangum had cost the employees their jobs.

In addressing the Respondent's motion to dismiss the allegations, the judge acknowledged his obligation to consider the evidence in the light most favorable to the General Counsel. Accordingly, the judge took into account that Mangum was a high profile union supporter, that Mangum's complaint at the May 29 drivers meeting had prompted the Respondent's investigation of the Nashville runs, and that there was "ample evidence of Respondent's anti-Union animus . . . [which] ran directly to Johnnie Mangum." He also considered evidence showing that Respondent did not always discipline employees for failure to maintain their logs in accord with DOT regulations, as well as the Respondent's failure to discipline Pair. Nevertheless, because there was no showing that the Respondent attempted to publicly link Mangum or the Union with the discharges, the judge found that the General Counsel's evidence failed to establish a connection between the Respondent's animus and the discharges. He therefore granted the Respondent's motion and dismissed the allegations.

We find that the judge applied too narrow a view of the law and the evidence in assessing the General Counsel's case. The General Counsel's threshold burden in a case alleging an unlawful discharge under Section 8(a)(3) is to make a "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).¹⁴ The Board has long rec-

ognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances. *Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998). Circumstantial evidence includes animus, timing, and disparate treatment. See *Tres Estrellas de Oro*, 329 NLRB No. 3 (1999); *Queen Mary*, 317 NLRB 1303, 1311 (1995); *Special Mine Services, Inc.*, 308 NLRB 711, 721 (1992); and *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531 (6th Cir. 2000).

Here, the judge failed to appreciate the significance of the circumstantial evidence and the reasonable inferences to be drawn from it. While there may be no "smoking gun" in this case, the General Counsel's evidence did satisfy his threshold burden. The General Counsel established that the Respondent went to great lengths to squelch the employees' exercise of their Section 7 rights. It threatened employees with a reduction in hours in violation of Section 8(a)(1). It sent an employee home early, and disciplined, suspended, and discharged two other employees because they supported the Union in violation of Section 8(a)(3). Finally, it unilaterally implemented a stricter dock policy in violation of Section 8(a)(5). These violations are more than sufficient to establish that the Respondent harbored antiunion animus.¹⁵

The General Counsel also presented substantial evidence of disparate treatment. He established that dispatches and log misrepresentations in violation of DOT regulations were not extraordinary events, and that Respondent turned a blind eye to such practices. Indeed, when first advised of the Nashville dispatch by Mangum, Pair and Warner did nothing. Only after it was confronted by Mangum, in front of other drivers, with the incongruity of dispatching drivers out of hours while other drivers remained on layoff did the Respondent react.¹⁶

¹⁵ The Respondent maintained a corporate-wide policy, published in its employee handbook, which though not unlawful itself, is further indicative of animus. The handbook states in part, "It is important for you to know that this Company values union-free working conditions." *Affiliated Foods, Inc.*, 328 NLRB No. 165 (Aug. 4, 1999); *Dynatron/Bondo*, 323 NLRB 1263 (1997); and *Gencorp.*, 294 NLRB 717, n. 1 (1989). See also, *Overnite Transportation Co.*, 329 NLRB 990, 1008 fn. 7 (1999), enfd. 240 F.3d 325 (4th Cir. 2001), rehearing denied Apr. 17, 2001, petition for rehearing and rehearing en banc pending.

¹⁶ Chairman Hurtgen concedes in his dissent that the record contains substantial evidence of antiunion animus, but finds that the General Counsel failed to establish a nexus between the animus and the Respondent's discharge of Spillers, Wyrick, and Cole. He would require the General Counsel to prove as part of his initial case that complaints by nonunion adherents were ignored. We disagree. We find that the General Counsel established a sufficient nexus by presenting evidence that the Respondent selectively punished log book violators and over hours drivers.

¹³ At the hearing, Pair (who was called by the General Counsel as an adverse witness pursuant to Rule 611(c) of the Federal Rules of Evidence), did not deny ordering that Spillers and Wyrick be dispatched. His explanation was that he thought they would be sent to Memphis as a team, thereby splitting their hours on the road. He said that Cole was terminated for sending the two drivers out separately. Pair did not explain how the teamed drivers were to pick up two loads waiting in Nashville.

¹⁴ See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

Further, Mangum's point at the meeting was that there appeared to be work for laid-off drivers. Mangum did not ask that anyone be punished and could hardly have anticipated that anyone would be, in a setting where bending the rules on over hours runs was at least an occasional practice. Nevertheless, the Respondent discharged the drivers. Under the circumstances, that step, as the Respondent could not have failed to realize, effectively put the onus on Mangum for their loss of jobs. While there is no evidence that the Respondent *explicitly* blamed Mangum for the discharges, there was no need to do so given Mangum's protest in front of other drivers at the May 29 meeting. The connection that the Respondent intended was inescapable, i.e., that union activist Mangum, whose protests echoed the Union's concerns, was to blame. In short, Mangum's protest gave the Respondent an opportunity to discredit the Union. Based on the record, it is reasonable to infer that the Respondent seized that opportunity.¹⁷

For these reasons, we find that the General Counsel has met his threshold burden of showing that the Respondent acted out of antiunion animus in discharging Spillers, Sidney Wyrick, and Cole. Accordingly, we shall remand the case to the judge for further consideration of these allegations (and the related allegation concerning Anna Wyrick's discharge), including reopening the hearing to permit the Respondent to present evidence supporting its defenses and the General Counsel to present rebuttal evidence.¹⁸

¹⁷ Our dissenting colleague states that even if the Respondent acted against Spillers, Wyrick, and Cole because the complaint about them was voiced by a union adherent, it would not establish a violation. But, if the Respondent was motivated even in part to act by the identity and union sympathies of the complainer, then it took the action for an *unlawful* reason, and under the longstanding guidelines set forth in *Wright Line*, supra, the General Counsel has met his threshold burden. That is the issue we address here.

¹⁸ See, *Mike Yurosek & Son, Inc.* 306 NLRB 1037, 1039 (1992). Respondent contends, among other things, that Cole was a supervisor. On remand, we direct the judge to take evidence and make findings about Cole's alleged supervisory status and whether, in the circumstances of this case, he is afforded the protections of the Act. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), and *Advertiser's Mfg Co.*, 823 F.2d 1086 (7th Cir. 1987).

We also direct the judge to permit the General Counsel to introduce evidence regarding the discharge of driver Tommy Bowen. The judge excluded such evidence on the ground that a 8(a)(3) allegation pertaining to Bowen's discharge was settled prior to the hearing. However, the Board has long held that evidence pertaining to settled charges may properly be considered as background in determining the motive or objective of a respondent in activities occurring either before or after the settlement. See *Black Entertainment Television*, 324 NLRB 1161, 1163 (1997); *Park Manor Nursing Home*, 277 NLRB 197, 199 (1985); and *Steves Sash & Door Co. v. NLRB*, 401 F.2d 676, 678 (5th Cir. 1968). This is true regardless of whether there was specific reservation language in the settlement agreement. See *Outdoor Venture Corp.*, 327 NLRB 706, 708 (1999). Here, the General Counsel sought to introduce

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Overnite Transportation Company, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in full below.

1. Cease and desist from

(a) Threatening its employees with reduction in work hours because of the employees vote in favor of the Teamsters Local 667, Affiliated with the International Brotherhood of Teamsters.

(b) Disciplining, suspending, and discharging its employees because of their support of the Union.

(c) Unilaterally instituting a more stringent dock policy.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer immediate and full employment to Robert Crawford, Marcus Cole, and Tollie Graves to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Crawford, Marcus Cole, Tollie Graves, and Horace Quinn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, suspensions and discharges of Robert Crawford, Marcus Cole and Tollie Graves and illegally reduced hours of Horace Quinn, and within 3 days thereafter notify those employees in writing that this has been done and that the warnings and discharges will not be used against any of them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to ana-

the evidence regarding the circumstances of the Bowen discharge solely to the extent that it was relevant to the issue of disparate treatment in the discharge of Spillers, Wyrick, and Cole. Accordingly, we reverse the judge's ruling and direct that the General Counsel be permitted to introduce evidence regarding the circumstances of the Bowen discharge for this purpose.

lyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked 'Appendix.'¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 17, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 11, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations concerning the discharges of drivers Steve Spillers, Sidney Wyrick, and dispatcher Mark Cole are severed and remanded to the administrative law judge for proceedings consistent with this Decision and Order, including reopening the record for the receipt of further evidence on this issue.

IT IS FURTHER ORDERED that the judge prepare and serve on the parties a supplemental decision containing his credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CHAIRMAN HURTGEN, dissenting in part.

Contrary to the majority, I would affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) by discharging employees Sydney and Anna Wyrick, Steve Spillers, and dispatcher Mark Cole. In agreement with the judge, I find that the General Counsel failed to establish that antiunion animus was a motivating factor in these discharges.¹

The relevant facts are essentially undisputed. On May 21, 1997, Sydney Wyrick and Spillers were dispatched on separate runs from the Respondent's Memphis, Tennessee terminal to Nashville, Tennessee.² Pursuant to Federal Department of Transportation (DOT) hours-of-service regulations, neither driver could lawfully drive these runs because they had both just completed a 30-hour California run. It is undisputed that these two employees knowingly violated the DOT regulations by accepting and completing the runs to Nashville. In addition, it is undisputed that they both falsified their driver logs to show that they were off duty during the period of time they were making the Nashville runs. The falsification of the driver logs also violated DOT regulations.

Employee Johnnie Mangum, an outspoken union supporter, noticed the DOT hours-of-service violation and promptly reported it to Pair and to the Respondent's terminal manager, Danny Warner, in a private conversation. The Respondent took no action in response to the report. On May 29, Mangum repeated these accusations at a drivers' meeting conducted by the Respondent's regional dispatch manager, Paul Stenback, and assistant terminal manager, Mike Eastman. Specifically, Mangum asked why the Respondent was "aiding and abetting" the dispatch of drivers in violation of DOT regulations when other drivers were still on layoff.³ After the meeting, Mangum presented Eastman with documents that Mangum had gathered in the course of his investigation of the matter, which showed that Spillers and Wyrick had violated DOT regulations. After conducting its own investigation, the Respondent discharged Spillers and Wyrick for violating DOT regulations, and also discharged Cole for dispatching them.⁴

¹ Because I would affirm the dismissal on the merits, I find it unnecessary to pass on the other matters addressed by the majority in their decision to remand the allegations to the judge.

² There is some dispute as to whether Cole dispatched the two drivers on separate runs on his own initiative or at the direction of Linehaul Supervisor Richard Pair.

³ Mangum had been laid off from September 1996 to May 1, 1997. At the time of his recall, at least 10 other drivers remained on layoff. At the commencement of the hearing in this case, the parties settled complaint allegations that the layoffs violated Secs. 8(a)(3) and (5).

⁴ The discharge of Sydney Wyrick effectively caused Anna Wyrick's discharge as well, because they were employed as a husband and wife team. The General Counsel concedes that the lawfulness of Anna

There is no contention that Wyrick, Spillers, or Cole were discharged because of their own union sympathies or activities, if any. Rather, the General Counsel's sole contention is that they were fired as part of a scheme to undermine the union and create disaffection among the employees by creating the impression that a leading union supporter, Mangum, had cost the employees their jobs. After the General Counsel rested his case, the Respondent moved to dismiss these complaint allegations. After carefully considering the evidence presented by the General Counsel, the judge granted the Respondent's motion.

Considering the evidence in the light most favorable to the General Counsel, the judge found that the General Counsel had established that Mangum was a high-profile union supporter and that the Respondent investigated the Nashville runs because of Mangum's complaint at the May 29 drivers' meeting. Although the judge assumed the existence of ample evidence of antiunion animus on the part of the Respondent, the judge found no nexus between the Respondent's antiunion animus and the discharges. Accordingly, the judge entered an order recommending dismissal of the relevant complaint allegations.

The majority reverses the judge and finds that the General Counsel met his burden of establishing that antiunion motivation was a motivating factor in the discharges. My colleagues cite evidence assertedly showing that the Respondent harbored antiunion animus and that it previously "turned a blind eye" to DOT violations by other employees at its Memphis terminal. The majority states that, by discharging the drivers following Mangum's public accusations, the Respondent effectively put the onus on Mangum, a union activist, for their loss of jobs. In the majority's view, this is sufficient to meet the General Counsel's threshold burden. I disagree.

The General Counsel has the burden of proving that antiunion animus was a motivating factor in the Respondent's decision to discharge Spillers, Wyrick, and Cole. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *ap- proved* in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983), *overruled* in part on other grounds, *Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994). As the Board held in *Borin Packaging Co.*, 208 NLRB 280, 281 (1974), "in the absence of a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all. Whether other persons would con-

sider the reasons assigned for a discharge to be justified or fair is not the test of legality under Section 8(a)(3)." In determining whether the General Counsel has met his burden of proof, the Board must, of course, consider not only the evidence supporting the General Counsel's position, but the evidence that tends to detract from it. *Sam's Club v. NLRB*, 173 F.3d 233, 239–240 (4th Cir. 1999). The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). In short, the Board must consider "all of the reasonable inferences compelled by the evidence in reaching its decision." *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 514 (4th Cir. 1998).

Applying these principles to the facts of this case, I would find, in agreement with the judge, that the General Counsel failed to prove that Mangum's support for the union was a motivating factor in the decision to discharge Spillers, Wyrick, and Cole. It may be true, as the majority states, that the Respondent harbored antiunion animus.⁵ However, the existence of antiunion animus alone is not sufficient to establish a violation of Section 8(a)(3). Rather, the General Counsel must establish a nexus between the animus and the adverse action alleged to be unlawful. In agreement with the judge, I would find that no such nexus was established in this case.

My colleagues say that the Respondent did not take action against prior violations of DOT regulations. They say that the Respondent took action herein only because union activist Mangum complained about the violations. However, the evidence indicates that Respondent took the action because a legitimate complaint was openly made in a public meeting. The fact that it was made by a union adherent was not controlling. Indeed, there is no evidence of discrimination, i.e., there is no evidence of a

⁵ In finding that the General Counsel established antiunion animus, however, I rely solely on the violations of the Act found by the Board in this case. The majority additionally relies on the following language in the Respondent's employee handbook: "It is important for you to know that this Company values union-free working conditions." According to the majority this statement, even though lawful, may be used as evidence in support of a finding that the Respondent violated the Act. I do not agree. Sec. 8(c) is quite clear on this point: "the expressing of any views, argument or opinion ... shall not constitute *or be evidence of* an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis supplied). Consistent with this plain language, speech protected by Sec. 8(c) "cannot be used by the General Counsel to establish an employer's anti-union animus." *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998). See also *Holo-Krome v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir. 1990) (same); *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979) (same).

Wyrick's discharge stands or falls on the disposition of her husband's case.

failure to take action in circumstances where such a complaint is made by a nonunion adherent.

Further, even if Respondent acted because the complaint was made by a union adherent, that would not establish a violation. In this regard, the theory espoused by my colleagues is that the Respondent took the action herein in order to blame the Union (through Magnum) for the discharges.

The problem with the theory is that it is only a theory. It is unsupported by the facts. There is no evidence that the Respondent blamed Magnum for the discharges. Indeed, Respondent could not have done so, for Magnum never sought that discharge. Rather, the facts show that the Respondent was confronted with an open, public, and seemingly correct accusation that DOT regulations had been violated.⁶ Of course, the fact that an accusation comes from a union adherent does not preclude an employer from taking corrective action. For example, if a union supporter complains about the fact that an employee is performing excess overtime work, surely the corrective act of taking away that work is not rendered unlawful simply because the complainant is a union adherent.

My colleagues have extended *Wright Line*, supra. That case involves adverse action against an employee because of his union activity. By contrast, the instant case involves adverse action against employees because of their misconduct, where that misconduct was brought to the employer's attention by a union adherent. That is not a *Wright Line* situation.

It may well be true, as the majority states, that the other drivers blamed Mangum and/or the union for causing the discharges. However, what is at issue is the Respondent's motivation, not what Mangum's coworkers may have thought. As discussed, an unlawful motive has not been established.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with reduction in their hours of work because they vote in favor of Teamsters Local 667, affiliated with the International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT discipline, suspend, or discharge our employees because of their support of the Union.

WE WILL NOT unilaterally implement more stringent rules for dock employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL offer immediate and full employment to Robert Crawford, Marcus Cole, and Tollie Graves to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other right or privileges previously enjoyed.

WE WILL make Robert Crawford, Marcus Cole, Tollie Graves, and Horace Quinn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL rescind the more stringent dock rules implemented in April 1997.

OVERNITE TRANSPORTATION COMPANY

Linda Kirchert, Esq., for the General Counsel.
Kenneth Sparks, Esq., Lisa Wetzel, Esq. and Ted Tow, III, Esq.,
Chicago, Illinois, for Respondent.
Samuel Morris, Esq. and Henry Perry, of Memphis, Tennessee, for the Teamsters.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Memphis, Tennessee, on several dates from April 22 through August 11, 1998. The charges were filed on various dates between April 12, 1996, and April 10, 1998. A fourth amended consolidated complaint issued on March 30,

⁶ The prior accusation was made privately.

1998. In consideration of the full record¹ including briefs filed by Respondent and General Counsel, I make the following findings.

Jurisdiction

Respondent admitted that at material times it has been a corporation with an office and place of business in Memphis, Tennessee (the Memphis Service Center) where it has been engaged in the interstate transportation of general commodity freight; and during the 12-month period ending February 28, 1998, it sold and shipped and it purchased and received from and to its Memphis Service Center, goods and materials valued in excess of \$50,000 to and from points outside Tennessee. Respondent admitted that it has been an employer engaged in commerce at material times.

Labor Organization

Respondent admitted that Charging Party Teamsters has been a labor organization at material times.

The Alleged Unfair Labor Practices

The complaint includes allegations of independent 8(a)(1) violations; various 8(a)(3) violations; and a unilateral change in a mandatory bargaining condition in violations of section 8(a)(5).

The alleged unfair labor practices stem from and after two election campaigns. The Union initiated an organizing campaign in 1995 but lost an April 25 election. It started another campaign and filed a representation petition in July 1996. On September 16, 1996, a NLRB election resulted in the Union receiving 219 votes while 201 votes were cast against the Union. Challenge ballots were determinative and objections were filed. The Union was certified, as exclusive collective-bargaining representative in the following bargaining unit, on October 9, 1997:

All city drivers, road drivers, dock workers, jockeys/hostlers, building maintenance employees and shop employees employed at Overnite Transportation Company's Memphis, Tennessee, Hub and City Terminal facilities; excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

There are around 450 employees at the Overnite terminal in Memphis. Those include dockworkers, city drivers, shop personnel, road drivers and office personnel. There is now only one terminal at Memphis. Formerly there was a city terminal and a hub terminal.

Dan Warner is Respondent's terminal manager. The assistant terminal manager at material times was Michael Eastman. Frank Plemmons is Respondent's operations manager over the city. Tommy Lee Jones and Jeff Cain are operations managers on the docks. Richard Pair is linehaul supervisor for over-the-

road drivers. Around a year ago Duane Williams was an operations manager over the city drivers and the dock.

The following events may be material to this litigation (listed in chronological order):

April 12, 1996:	Union filed 26-CA-17397 charge ²
May 1996	Union initiated its 1996 organizing campaign ³
June 2, 1996	Michael Eastman became Assistant Service Center Manager ⁴
July 9 and August 1, 1996:	Written warnings to Horace Quinn
August 1996	Union video – "Time for Unity" ⁵
August 15, 1996:	Transferred Horace Quinn for 2 weeks
September 16, 1996:	NLRB Election (For Union 216, Against 201)
September 17, 1996	Supervisor Tuggle threatened reduced hours
September 17, 1996:	Reduced hours of Horace Quinn
October 1, 1996:	Suspended Horace Quinn
October 18, 1996:	Suspended Horace Quinn
October 26, 1996:	Discharged Horace Quinn
April 15, 1997:	Imposed more stringent enforcement of damaged and misloaded freight policies
May 6, 1997:	Written warning to Robert Crawford
May 15, 1997:	Suspended Robert Crawford
May 28, 1997:	Suspended Tollie Graves
May 28, 1997:	Terminated Robert Crawford
June 6, 1997:	Suspended Sidney Wyrick, Steve Spillers, Mark Cole
June 12, 1997:	Terminated Sidney Wyrick, Spillers, Mark Cole
July 15, 1997	Terminated Marcus Cole
October 9, 1997	Union certified
October 31, 1997:	Suspended Tollie Graves
November 3, 1997:	Terminated Tollie Graves
	1996:

International Organizer Henry Perry was involved in the Union's election campaigns with Respondent. The Union lost a

² As shown in the complaint various charges were filed against Respondent between April 12, 1996, and January 14, 1998.

³ The Union initiated its 1996 organizing campaign in May 1996 when four organizers were assigned to the campaign. Employees became involved in handbilling at Respondent's terminal, solicitation for the Union, wearing union paraphernalia, and the making of a union video.

⁴ Michael Eastman implemented several changes in the operations in order to improve efficiency. He implemented a progressive discipline system for infractions of similar nature, including counseling, written warning, final warning and suspension and discharge.

⁵ Several employees appeared on that union video and made statements supporting the Union. Those employees included Robert Crawford, Sam Powell, Kyle Brooks, Ralph Marshall, David Kanable, Al Parker, James Fulgum, Tony McElroy, Kenny Hill, Darrell McCall, Charles Watkins, Johnny Mango, Charles Holbrook and James Tyler.

¹ Pursuant to my order dated October 6, 1998, R Exh. 59 was rejected on a determination that Respondent had failed to comply with my instructions as specified in Rule 1006, Fed. R. Evid. That document is now in the rejected exhibit file. Counsel for General Counsel's unopposed post-hearing motion for the introduction of GC Exh. 102 through 108 is granted.

1995 election before winning in 1996. Some of the Union supporting employees appeared on a videotape the Union prepared in 1996 (GC Exh. 2). The Union distributed handbills during that 1996 campaign. Union employees Bobby Ramshaw, Melba Coffman and T.C. Bundrant helped Perry meet and talk with employees as they left Respondent's Service Center gate on the Thursday and Friday before Memorial Day. Handbills were passed out to the employees at Respondent's gate at least once a week from then until the election on September 16, 1996. Most of the city drivers and the day and midnight shifts would assist in that handbilling.

Paul Holder testified Respondent held dinners for the employees at the Peabody Hotel in Memphis a week before the September 16 election. Three dinners were held to accommodate all unit employees. Holder also attended an employee meeting held in the training room of the trailer shop. There were around 20 to 25 midnight shift employees present. Pictures of employees were displayed around the room. The pictures were apparently from the Union video "Time for Unity" and showed the employees with amusing or uncomplimentary facial expressions.

Sam Powell, a dockworker, testified that Danny Warner talked to about 75 to 80 employees in the training room shortly before the September 16, 1996 election. Warner told the employee they should not belong to the Union. There were pictures of some employee supporters of the Union hung on the walls. Those pictures were taken from the 1996 Union video – "Time for Unity." Warner referred to the pictures and said to the employees, do you want these people to be your leaders and to represent you and that he did not think the employees wanted those leaders.

1997:

Assistant Terminal Manager Michael Eastman held meetings of employees in April 1997 and warned the employees that mistakes such as miscounting freight and misloads would no longer be tolerated. Operations Manager Plemmons reconfigured the city routes by zip codes and set productivity goals in June and July 1997.

The representation case continued through pending objections and investigation of challenge ballots. After challenges were resolved Respondent withdrew its objections and the Union was certified as exclusive collective-bargaining representative on October 9, 1997.

The complaint included alleged unfair labor practices involving Robert Crawford, Tollie Graves, Sidney Wyrick, Steve Spillers, Anna Wyrick, Mark and Marcus Cole. Robert Crawford, appeared in the August 1996 "Time for Unity" video. Crawford's picture, which was extracted from the Time for Unity tape, was one of those pictures posted on the training room wall during some of Respondent's antiunion employee meetings before the September 1996 election.

Findings:

1996:

Horace Quinn:

July 9 warning:

August 1 warning:

August 15 transfer:

September 17 reduced hours:

October 1 and 18 suspensions:

October 26 discharge:

Horace Quinn initially worked for Respondent through a temporary employment service. After 4 weeks he was hired to work directly for Respondent. Quinn was a part-time dock employee and his total employment extended from April 24 until October 26, 1996. At first he worked the 5 p.m. to 1:30 a.m. shift. During his orientation he explained to Operations Manager Duane Williams that he needed to pick up his small child from the baby-sitter at 1:30 a.m. each day.

Quinn supported the Union beginning around June 1996, by wearing union insignia and handbilling at Respondent's front gate. Horace Quinn testified that shortly after he started passing out union leaflets he started receiving hand freight assignments.

On July 9 Quinn was counseled for inefficiency. Quinn admitted that he stripped 5,845 pounds of freight in 4 hours but he testified that he was unfairly assigned freight that required unloading by hand.

A couple of weeks after his corrective action report Quinn saw supervisor Donald Tuggle pick up a box where Quinn had been working and throw the box into a trailer. Quinn received a corrective action report the next day for a misload and he complained to supervisor Joey Smith that Tuggle had misloaded an item of freight and then forged Quinn's signature on the manifest. Quinn agreed that he heard nothing more about the incident after Operations Manager Duane Williams told him that he would take care of the matter. Duane Williams testified that he did determine that Donald Tuggle was responsible for the misload and Quinn was not disciplined.

Quinn received a final warning for inefficiency on August 1. He admitted that he unloaded 5,862 pounds of freight in 6 hours but that he was again assigned the unloading of freight by hand. Around August 13 Quinn was called in to meet with Michael Eastman and dock supervisor Joey Smith. Eastman testified that Quinn was awarded another warning but Eastman tore up the warning and assigned Quinn for retraining. Quinn was reassigned for 2 weeks or more additional training with Dale Watson on the third shift. Quinn testified in agreement with Eastman that he was called before Assistant Terminal Manager Eastman. Eastman told Quinn that he had a final warning written up by Duane Williams and that would be Quinn's sixth writeup.⁶ Eastman said that he had reviewed the writeup and was going to tear it up and send Quinn to train with Dale Watson. A memo in Quinn's file shows that he was assigned to the 3rd shift for 2 weeks training under Dale Watson beginning on August 13, 1996.

Quinn pointed out that reassignment would cause problems in picking up his child at 1:30 a.m. He subsequently requested to switch back to second shift after learning that Dale Watson

⁶ In addition to the writeup that Assistant Terminal Manager Eastman tore up around August 1, Quinn had write ups for inefficiency dated April 30, July 9, August 1, October 10 and October 18, 1996, a May 14, 1996 writeup for failure to obey orders and a September 17, 1996 writeup for insubordination and failure to obey orders.

reported to work at 10 or 11 p.m. His request was denied but he was allowed to return to the second shift after about 2 weeks on the third shift.

On the day after the September 16 NLRB election, supervisor Donald Tuggle told Horace Quinn to clock out after about 2 hours work. Quinn asked supervisor Joey Smith why he was being sent home with plenty of work left. Smith called Tuggle over. Donald Tuggle said he had instructions to start sending workers home early. Quinn asked why it was worthwhile to have him come in for only 2 hours and Tuggle replied that Quinn "made that decision, from aspects that happened last night." Quinn was awarded a second final warning on that day, September 17, 1996, for taking unauthorized photographs of his freight assignments.

On September 30 or October 1 Quinn unloaded 34 bills in 7.5 hours and was awarded a final warning and 3-day suspension. Respondent contended that load was 100 percent skids.⁷ Quinn testified that it took him too long to unload the freight because he was not assigned a forklift and had to wait while others finished with their forklifts.

On October 24 Quinn received his final warning for low production for work on October 17 and 18. On October 17 he unloaded 16 bills of 10,957 pounds in 7.4 hours. On October 18 Quinn finished 3 of 14 bills in more than 11 hours. Quinn testified that other employees – John Newton and Curtis Walker – also had poor production. He testified on cross-examination that Newton was also discharged for inefficiency. Quinn testified that he felt that Newton and Walker were not union supporters.

Credibility:

I was bothered by Horace Quinn's testimony as to why he received various disciplinary actions. In that regard even though he testified about his discussions with supervisors, especially Duane Williams, about why he performed below production, those discussions failed to include reasons he gave for those same actions at the hearing. For example Quinn testified that he received a corrective action report in June or July for failure to make production. He testified that he did not make production because Respondent started assigning him hand freight after it learned he supported the Union. However, he made no mention of being unfairly assigned hand freight during his comments on the corrective action report (GC Exh. 71) or in his version of a conversation he had with Operations Manager Duane Williams after his only corrective action report in June or July (GC Exh. 71, corrective action report 7/10/96). I also noticed that Quinn's testimony did not square with other events including his prior statements. For example when given a final warning on September 30 Quinn wrote "I am not the only one on the dock you have people on the dock in the way at some time you have to wait till they get through." (GC Exh. 71). However, during the hearing Quinn testified that his production was poor because he was not assigned a forklift and had to wait for others to finish with a forklift.

⁷ Skids required a forklift as opposed to other freight that may have required unloading by hand.

I am unable to credit Quinn. In that regard I am unable to credit that Quinn was discriminatorily assigned hand-freight and I credit the testimony of Duane Williams that Quinn did have the use of a forklift on September 30.

In areas where Quinn was not disputed such as his testimony about Donald Tuggle, I credit Quinn.

Conclusions:

General Counsel has the burden of proving that Respondent was motivated to take action against Horace Quinn because of his protected activities or that Respondent engaged in pretext in an effort to hide the fact that it took that action. See *Manno Electric, Inc.*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In consideration of that issue I shall look to whether Respondent had knowledge of Quinn's union activities; whether General Counsel proved animus; the timing of Respondent's actions and whether Quinn was treated in a disparate manner. As shown above Quinn engaged in union activity beginning in June 1996 by wearing union insignia to work and handbilling for the Union at Respondent's front gate.

The entire record supports a finding of animus. Respondent took action in strong opposition to the Union's two election campaigns and it engaged in unfair labor practices. Moreover, as shown above, Quinn testified that supervisor Tuggle told him on September 17 that Quinn had made the decision to reduce his hours by his action the prior evening. The action that prior evening was the employees' election of the Union.

As to timing, Quinn was disciplined in July. That was approximately a month after he first engaged in union activity. Quinn received additional disciplinary actions in August and September and was discharged in October. The discharge occurred slightly over a month after the Union won the September 16 election.

In regard to the question of disparate treatment, Horace Quinn testified that another employee was also discharged for poor productivity. That employee, John Newton, was not a union supporter.

Although the timing of Quinn's discipline causes suspicion, the record also shows that Quinn received a corrective action report for inefficiency before he first engaged in union activity. That corrective action report dated April 30, 1996 tends to show that Quinn did have a production problem. On May 14 Quinn received another unrelated corrective action report. On that occasions he was warned for leaving the premises after being directed to unload a trailer.

The record and even Quinn's testimony, draws sharp questions as to whether he was ever treated in a disparate manner. I am not convinced that the record supports General Counsel on that issue. As shown above I do not credit the disputed testimony of Quinn that he was discriminatorily assigned only hand-freight after he became known as a union supporter. Quinn's testimony and Respondent's records show that testimony was not credible. Additionally, the record supports Respondent's argument that Quinn engaged in the conduct that caused Respondent's corrective action. Although, as shown

below, the evidence showed disparity in the treatment of some union supporters, such as not the case with Quinn. He was only employed for 6 months and he was disciplined for similar offenses on April 30, July 9, August 1, August 13, September 30 and October 24, 1997. Those writeups included two counselings, a final warning and another warning that Eastman tore up, another final warning on September 30 and one on October 24. Quinn was treated with more tolerance than what is provided in Respondent's procedure and policy of three disciplinary actions before discharge.

Moreover, even if I should find that Respondent was motivated by Quinn's union activity, in its decision to discipline and discharged him, there is a question as to whether Quinn would have been disciplined and discharged in the absence of union activity. *Manno Electric, Inc.*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

According to Quinn, he routinely failed to achieve production and was only occasionally awarded corrective action reports. His impression was that Respondent was trying to make him look bad by spacing out the corrective action reports even though they could have been awarded more frequently. Quinn's impression makes no sense. If, as General Counsel alleges, Respondent was motivated by Quinn's union activities, then it would have been in its interest to discipline and discharge Quinn at the earliest opportunity. By ignoring opportunities to discipline him as Quinn believed Respondent missed several early opportunities to discipline and discharge him after learning of his union preference.

Additionally, the full record including Quinn's testimony shows that he was granted more than usual tolerance under Respondent's similar offense progressive discipline policy. That policy required the disciplinary steps of (1) counseling, (2) warning, (3) final warning and suspension, and (4) termination. Quinn was counseled for inefficiency on April 30 and again on July 9, 1996. He was warned for inefficiency on August 1 and warned and suspended for inefficiency on October 1. Then he was discharged for inefficiency on October 24, 1996. Quinn had five corrective reports when four would have been sufficient for discharge. Assistant Terminal Manager Eastman explained why Quinn was given the extra disciplinary step. According to Michael Eastman's undisputed testimony Respondent treated Quinn's August 1 warning as a warning (not final) because Quinn had not progressed to the point of a final warning when considered beginning at the time Michael Eastman came to the Memphis terminal. That evidence supports Eastman's testimony that he refused to consider for progressive discipline purposes, all disciplinary actions against employees that predated Eastman's coming on board in Memphis. Additionally, as shown above, Michael Eastman tore up another warning during August 1996 and assigned Quinn for retraining.

I am convinced in view of the above evidence that General Counsel failed to prove that Respondent was motivated by union activities in disciplining and discharging Horace Quinn and I find that Respondent would have disciplined and discharged Quinn in the absence of union activities. As to Quinn's retraining assignment, the credited evidence shows that he was not

discriminatorily treated in an adverse manner. Instead of receiving another warning Quinn was given an opportunity to improve his production through retraining.

Unlawful threat by Supervisor Tuggle:

On the day after the NLRB election, supervisor Donald Tuggle was asked why Horace Quinn was being sent home with plenty of work left. Tuggle said he had instructions to start sending workers home early. Quinn asked why it was worthwhile to have him come in for only 2 hours and Tuggle replied that Quinn "made that decision, from aspects that happened last night." The NLRB election was held the "last night" and the employees voted in the Union.

I find that supervisor Donald Tuggle did tell Horace Quinn to go home after 2 hours work time on September 17, 1996. When questioned by Quinn and supervisor Joey Smith, Tuggle explained that he was sending Quinn home because of Quinn's decision the night before. On the night before some employees including Quinn celebrated the Union's win in the NLRB election. I find that Respondent was motivated by the election results to deprive Quinn of work time. Respondent failed to show that it would have sent Quinn home in the absence of the union activity.

Credibility:

The testimony regarding Donald Tuggle's September 17 comments were not disputed. I credit the testimony of Horace Quinn in that regard.

Conclusion:

The comments by supervisor Donald Tuggle to employee Horace Quinn on the day after the NLRB election were to the effect that Quinn made the decision to reduce his work hours during that election. The credited testimony of Quinn shows that Tuggle saw Quinn and other employees celebrating the Union victory after the election the evening before his comments. The Union received 216 votes to 201 against in that election and Quinn demonstrated by his conduct that he supported the Union. Tuggle's comment has the tendency to restrain and coerce employees in the exercise of protected union activity in violation of Section 8(a)(1) of the Act.

1997:

April 15 more stringent enforcement loading policies:

Respondent admitted that the Charging Party (Union) has been the exclusive collective bargaining representative for bargaining unit employees at material times, having been certified on October 9, 1997. Although an election was held on September 16, 1996 and the Union received 216 votes as opposed to 201 against, challenges were determinative and objections were filed. There was no showing that the certification should be considered retroactive.

Michael Eastman instituted changes in policy when he came to Memphis in the summer of 1996. The record also shows that Eastman held meetings of employees in April 1997 and warned the employees that mistakes such as miscounting freight and misloads would no longer be tolerated. The Union did not re-

ceive notice of changes in working conditions from Respondent in the spring, 1997.

There is no showing of conflicts in the above evidence.

Conclusions:

The record shows only that Michael Eastman held meetings of employees in April 1997 and threatened the employees that dock mistakes would not be tolerated. There was no showing that the Union was exclusive representative at that time. The election was held before that date but certification did not occur until several months later. There was no showing that the certification should be given retroactive effect. I find that General Counsel failed to prove that Respondent imposed more stringent enforcement of loading policies at a time when the Union was the exclusive collective bargaining representative.

Robert Crawford:

May 6 warning:

May 15 suspension:

May 28 termination:

Robert Crawford was a city driver. He handbilled and wore union insignia and appeared on the union video. Crawford was one of a number of union supporting employees including Sam Powell and Jimmy Gillentine, whose photographs were posted on the wall of Respondent's training room. As shown above before the September 16, 1996 election, the terminal manager and assistant (Danny Warner and Michael Eastman) spoke to the employees about those pictures. Warner said the photographs showed who would be the union leaders if the employees voted for the Union and he did not think they wanted those leaders. Respondent does not dispute that it knew of Crawford's union activities. Frank Plemmons admitted that Crawford appeared on the union unity tape video.

Crawford was terminated on May 29, 1997 (GC Exh. 15, 17, 18). At the time of his discharge Crawford had worked for Respondent for over 17 years. Until 1997 Crawford was not disciplined because of production. Other than Crawford no one has been discharged because of poor production on the downtown route. Drivers Donald and Tyler drove the downtown route and were never told to perform at the level required of Crawford.

Credibility:

I found Robert Crawford to be a straightforward witness that gave the impression of truthfulness. He appeared to answer questions fully and completely without evasion. I was impressed with his demeanor and I credit his testimony. Operations Manager Plemmons testified as to the reasons why Crawford was disciplined. Plemmons' testimony was vague and oftentimes made little sense. For example it was unclear why Crawford who had worked for over 17 years without discipline and without Plemmons taking time to survey (trail) his work, was suddenly given a high standard of production and fired within a 1-month period. Moreover, Plemmons' testimony that he determined that Crawford had averaged 1.63 stops per hour during the week of April 21 when he was accompanied by Duane Williams, and that he deducted 10 percent from that figure and set Crawford's standard for production at 1.55 stops per hour, makes little sense. I credit Crawford's testimony that

Duane Williams assisted him during the week of April 21. Williams admitted helping Crawford 1 day that week but Williams testified that day was not counted in determining Crawford's week's production. However, when questioned as to the specifics of computing Crawford's week's production, Williams could not recall if he was involved in computing those figures. By using the figures supplied on Respondent's July 16, 1997, position statement (see also GC Exh. 14) Crawford's production for the 4 days that week excluding Thursday, actually averaged 1.617 stops per hour (51 total stops divided by 31.54 hours). If Thursday is averaged along with all the other days that week, Crawford averaged 1.71 stops per hour (68 stops divided by 39.82 hours). According to Plemmons he told Crawford his production standard would be the rate he achieved with Duane Williams minus 10 percent. If 10 percent is deducted from 1.617 stops per hour, the result should be 1.46, not 1.55, stops per hour.

Respondent records show that Crawford's weekly production after the week of April 21, averaged 1.21, 1.17, 1.27, 1.55, and 1.43, stops per hour (GC Exh. 16). That evidence supports my determination that Plemmons' testimony was not credible.

During his initial testimony Plemmons denied that Williams had helped Crawford. Plemmons testified that Williams told him that he had not touched any freight at all. After Williams testified Plemmons changed his testimony and admitted that Williams had helped Crawford 1 day. Plemmons testified that the suggested target for city drivers set by Respondent's Richmond, Virginia office was 1.1 stops per hour. Plemmons was able to set the monthly targets provided those targets were no lower than the ones set by Richmond. He set Crawford's downtown route higher than 1.1 because the driving time between stops should have been shorter than on other routes.

Conclusions:

General Counsel has the burden of proving that Respondent was motivated take disciplinary action against Robert Crawford because of his protected activities. See *Manno Electric, Inc.*, 321 NLRB 1112 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As shown herein and in a prior decision by the National Labor Relations Board,⁸ Respondent has strongly opposed the Union in efforts to organize this and other terminals. I am convinced that General Counsel proved that Respondent harbored anti-union animus. In view of that showing and the evidence that proved that Respondent was fully aware of the productivity of Robert Crawford, I find the timing of the action against Crawford raises suspicion.

Over the years Crawford first drove a bob-truck and then a pup-trailer on the downtown route. The pup-trailer handled a larger load than the bob-truck. That was apparently necessary due to consolidation of several routes. Nevertheless, there was no showing that Crawford's work was less than productive until May 1997.

⁸ In *Overnite Transportation Co.*, JD(ATL)-13-98, the NLRB issued an order affirming the decision on May 1, 1998.

Operations Manager Frank Plemmons cautioned drivers that he might ride with them or follow them (trail) in order to check on production. Plemmons did neither with Robert Crawford. He did ask Operations Manager Duane Williams to ride with Crawford. Williams rode with Crawford during the entire week on April 21, 1997. According to Plemmons, Williams did not report anything unusual about Crawford's work. After that week Plemmons set a standard for Crawford of 1.55 stops per hour. Crawford agreed with Plemmons' testimony that Plemmons set a 1.55 stop standard but Crawford told Plemmons that he did not understand the production rate and that he would perform at his best work. Crawford credibly testified that Duane Williams complimented his work while Williams rode with him during the week of April 21.

Crawford explained that there is a month long festival in downtown Memphis called "Memphis in May." The major street along the Mississippi River (Riverside Drive) is blocked to all traffic during that festival. That caused more downtown traffic, which, along with added traffic for the festival, resulted in very heavy traffic along Crawford's route. That caused a slowdown in Crawford's work.

Crawford was disciplined for poor production during May. He received a May 6 corrective action report and a May 15 final warning and suspension. Robert Crawford was discharged for poor production on May 29, 1997.

Despite Crawford's alleged production problem, Plemmons did nothing after the week of April 21 to check into why Crawford was not achieving 1.55 stops per hour. The record failed to show that Respondent normally reacted without checking into the basis for a driver's slow work. Frank Plemmons testified that he rode with one other driver for a full week. Unlike the situation with Crawford where Plemmons did not even investigate why Crawford was not as productive when Duane Williams did not accompany him, Plemmons discovered that other driver (Roy Ford) took longer and more frequent breaks when Plemmons was not riding with him. Ford was not discharged. That evidence shows that Crawford was treated in a disparate manner. Other city drivers testified including Roy Donald, James Tyler and Gary Wade. Their testimony showed that Crawford was the only driver discharged over production⁹ and that they were not familiar with the downtown production standards that had been applied to Crawford. That evidence plus the evidence that Crawford was held to a much higher production standard than the standard required by the Richmond office, adds to my finding that Crawford was treated in a disparate manner.

Crawford's disciplinary actions occurred during the same period as other alleged violations. For example, as shown below Tollie Graves was suspended on May 20. That was a little over 1 week before Crawford was discharged on May 28.

⁹ Respondent's records show that no downtown driver other than Crawford was discharged. Other production records in evidence included Roy Donald and Dennis Hilliard but their performance occurred after Crawford was fired. Donald averaged 1.59 stops per hour during the times he ran the downtown route from June 4 through July 3, 1997. Hilliard averaged 1.95 stops per hour during the time he ran the downtown route between June 10 and July 3, 1997.

In view of the evidence showing animus, Crawford's union activity and Respondent's knowledge of his activity, the timing of its actions against Crawford and the disparate treatment of him, I find that Respondent was motivated by it animus to discipline and discharge Robert Crawford.

There remains a question of would Respondent have disciplined and discharged Crawford in the absence of union activities. *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Operations manager Plemmons testified there was a drop in Crawford's production over the course of months beginning around July 1996. Plemmons talked to Crawford about his production several times over those months. Crawford was running a little over a stop an hour, which was unacceptable. Plemmons never rode with Crawford because of production problems as he did for some drivers. Plemmons did ask Crawford if there was something causing his production to go down and Crawford replied there was nothing. On April 18, 1997, Duane Williams agreed to ride with Crawford for a week. Williams made daily reports to Plemmons during that week which was the week after April 18. Williams did not report anything out of the ordinary regarding how Crawford ran his routes. Crawford ran from around 1.0 to 1.2¹⁰ stops per hour during the week before Williams ran with him. While running with Duane Williams Crawford's production averaged 1.63¹¹ stops per hour. Plemmons then set a goal of 1.55 stops per hour and asked Crawford if he could maintain that average. Crawford said that he could but he added that he was only going to "do what I'm going to do." Plemmons told Crawford that he would talk with him in 1 week, on the following Monday. When Crawford talked with Plemmons that follows Monday, May 6, Plemmons wrote him up because of low production. On May 15 Crawford received a final warning and suspension.

However, Respondent failed to show why Crawford was held to a higher standard than other employees. It did offer evidence that downtown drivers that drove after Crawford was discharged achieved production higher than 1.55 stops per hour but there was no showing that anyone was required to satisfy that standard other than Crawford. As shown herein, the 1.55 stops per hour standard was not justified using Plemmons' alleged formula of 10 percent below what Crawford had achieved in 4 days with Duane Williams¹². Moreover, the jump from a

¹⁰ Despite the fact that according to Plemmons recollection, Crawford had never been disciplined even though his production ran at or below 1.2 stops per hour, he was disciplined and discharged after achieving production at a rate of from 1.17 to 1.55 stops per hour throughout the remainder of April and all of May, 1997.

¹¹ As shown herein, Plemmons was incorrect as to Crawford's production while Operations Manager Duane Williams rode with him. Respondent's records show that Crawford's production during the 4 days that week when Duane Williams allegedly did not assist him, was actually 1.617 stops per hour.

¹² When viewed in the best light from Respondent's viewpoint, Plemmons' arithmetic was in error. Moreover, the standard required of Memphis was only 1.1 stops per hour and there was no showing of why

stop an hour to 1.55 would have been an unlikely production increase even according to Plemmons' testimony as to what could be expected in the way of increased production. It appears that Plemmons must have known that Crawford could not achieve a production increase of from 1.0 or 1.2 to 1.55 stops per hour within a period of less than 2 weeks.

Moreover, there was no showing that the conditions during the week of April 21 were similar to those during May while Memphis in May caused additional traffic. In view of the full record I am convinced that Respondent would not have disciplined and discharged Crawford in the absence of union activities. I find that Crawford was disciplined and discharged in violation of Section 8(a)(1) and (3) of the Act.

*Sydney and Anna Wyrick, Spillers, Mark Cole.*¹³

June 6 suspensions:

June 12 discharges:

On June 6 Respondent suspended Sidney Wyrick and Steve Spillers. Wyrick, Spillers and Dispatcher/supervisor Mark Cole were discharged on June 12, 1997.

The allegations involving Wyrick, Spillers and Cole are unique. Instead of alleging they were discharged because of their union activities, they were allegedly discharged because a union supporter complained that Wyrick and Spillers had made an illegal run. Union advocate Johnnie Mangum made the complaint. Mangum made that complaint during a May 29, 1997, drivers meeting held by Respondent. There is no dispute but that Mangum's information was accurate and that Respondent's investigation following Mangum's complaint illustrated that Wyrick and Spillers had made individual runs from Memphis to Nashville and return at a time when neither had sufficient allowable hours left to make individual runs. Moreover, Respondent learned during that investigation that neither Wyrick nor Spillers had logged the Nashville run. Both the run and the failure to log the run constituted action in violation of applicable laws. Mark Cole was discharged because he was the dispatcher that sent Wyrick and Spillers on those illegal runs. General Counsel conceded that the complaint allegation regarding Anna Wyrick depends on a finding that her husband Sydney was illegally discharged. Counsel for General Counsel also conceded that Wyrick, Spillers and Cole were not discharged because of their own union activity.

By June 26, 1998, order the allegations regarding Sydney Wyrick, Spillers and Mark Cole were dismissed.

As to whether Respondent illegally terminated the Wyrick, Spillers and Cole, the NLRB considers whether General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Manno Electric, Inc.*, 321 NLRB No. 43 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980),

Crawford was held to a standard some .45 stops per hour above that standard.

¹³ The allegations regarding Sidney Wyrick, Spillers and Cole were dismissed by June 26, 1998 order (JDO (ATL)-07-98). General Counsel concedes that order effectively disposed of the allegations regarding Anna Wyrick since her allegation is conditioned upon the validity of the allegations relating to her husband Sidney Wyrick (Fn. 2, Brief of General Counsel).

enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Here, the alleged motivation is of a peculiar type. General Counsel contended that Respondent was motivated by a desire to undermine the Union. If the record is found to support General Counsel, I must consider whether the evidence shows that Respondent would have discharged those employees (and supervisor) in the absence of union activities.

As shown in the order dismissing the allegations regarding Wyrick, Spillers and Cole, I accepted for the sake of consideration of Respondent's motion, that General Counsel proved anti-union animus. Here the question is was Respondent motivated at least in part, to undermine the Union. Obviously, Respondent opposed the Union and would have favored the Union being undermined in the eyes of its employees. However, was that a motivation in its decision to discharge Wyrick and Spillers on learning of their illegal activity. There was no showing that Respondent acted to motivate the May 29 complaint by union advocate Mangum. Once Mangum brought up the matter Respondent was placed in the position of either acting or ignoring the complaint. By investigating the complaint and acting pursuant to that investigation, Respondent did nothing more than what was requested by Mangum. When it determined that Mangum's complaint was meritorious, it had before it information that Wyrick, Spillers and Cole had involved themselves in illegal runs and that Wyrick and Spillers had illegally failed to log the runs.

I am convinced under the circumstances that the evidence failed to show that Respondent was motivated even in part, to undermine the Union. Moreover, even if there were evidence supporting that finding, the record established that Wyrick, Spillers and Cole would have been discharged in the absence of a motivation to undermine the Union. Even though there was evidence that Respondent had failed to discharge a husband and wife driving team after the wife was ticketed for driving while her log showed that she was sleeping, that evidence of disparity failed to overcome the showing that Respondent was motivated only by its determination that Wyrick and Spillers engaged in unlawful activity by both making their Nashville runs and by failing to log those runs. Instead of undermining the Union, Respondent actually acted to open up drive slots for laid off employees. That was the point that Mangum was making in his May 29 complaint. He complained that Respondent should recall laid off drivers instead of permitting its drivers to make illegal runs. Respondent by acting in agreement with that point was actually acting in support of the Union and the laid off employees. See *Alachua Nursing Center*, 318 NLRB 1020 (1995).

I found that even if considered in the light most favorable to General Counsel, the record failed to show that Respondent discharged Wyrick, Spillers and Cole in an effort to undermine the Union.¹⁴

¹⁴ See JDO(ATL)-07-98. Although Respondent's investigation was precipitated by a complaint from Union advocate Johnnie Mangum, Respondent discovered that Mangum was correct and that Wyrick and Spillers had made illegal runs and failed to log those runs.

Tollie Graves:

May 20 suspension:

October 31 suspension:

November 3 discharge:

Marcus Cole:

July 15 termination:

Tollie Graves worked for Respondent for 5 years. He was a dockworker. Graves supported the Union from 1995 until he was terminated. He wore union insignia, talked to other employees about the Union and handbilled at the front gate during the 1996 campaign. Graves was suspended on May 20, counseled on May 28, and discharged on November 3, 1997.

Marcus Cole worked for Respondent from June 1994 until he was terminated in July 1997. Although he supported the Union in 1996 by wearing union insignia to work and hand billing, he did not support the Union during the 1995 election campaign. Cole worked in the shop from early 1995 and was not transferred back to the dock until October 1996. Respondent admitted in its brief that Marcus Cole wore a union hat.

Tollie Graves received a 5-year pin in October and was complimented on the quality of his work by Michael Eastman. Within a few days Graves was disciplined (counseled) by supervisors Tommy Lee Jones and Billy Scott for loading a shipment of paint and failing to document it as hazardous. Later that day, he was called in to meet with Dale Watson along with Jones and Scott, where he was suspended pending further investigation.

Cole received only one corrective action report in 1996. That was because he was tardy. On March 14, 1997 Cole was awarded a corrective action report marked "counseling" for inefficiency and for failure to sign a hazardous material section (GC Exh. 73). On April 7, Cole received a corrective action report for inefficiency. Supervisor Donald Tuggle told Cole that corrective action report was being changed from counseling to a warning. When asked why, Tuggle showed him his file where he had received similar infractions back when he first started working for Respondent. That was in 1994 and 1995.¹⁵

Marcus Cole received a final warning and 3-day suspension on April 22 for inefficiency and misloading. When Cole came in after July 9 he met with Michael Eastman. Eastman showed him documents that Cole had mis-shipped some freight (R Exh. 21). He told Cole that he was suspended indefinitely until further notice. Cole admitted that the information on his corrective action reports was accurate. On April 22, 1997, Marcus Cole was suspended and awarded a final warning for misloads and failure to complete a hazardous material document. On July 9 Cole was terminated for mis-shipping freight. Cole mistakenly referred to a bill of lading instead of the linehaul manifest. As a result the freight was misloaded onto the wrong trailer.

Former supervisor Paul Holder testified that misloads occur several times each day. Usually the employee guilty of a mis-

load is required to take the misload off the trailer but is not otherwise disciplined. Holder has misloaded some freight and he was not disciplined. As shown herein Holder has held several supervisory positions with Respondent.

Credibility:

Tollie Graves appeared to be a candid witness. His testimony was not disputed as to several material points. I was impressed with his demeanor and I credit his testimony. In many respects the testimony of Marcus Cole was not in dispute. Donald Tuggle did not testify and Cole's testimony regarding one-on-one conversations with Tuggle is not in dispute. I was impressed with Cole's demeanor and except as specifically noted herein, I credit his testimony.

Conclusions:

General Counsel has the burden of proving that Respondent was motivated to take action against Tollie Graves and Marcus Cole because of their protected activities or that Respondent engaged in pretext in an effort to hide the fact that it took that action. See *Manno Electric, Inc.*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The record shows that Respondent was aware of Tollie Graves and Marcus Cole's support of the Union. Although Cole was not disciplined for anything other than tardiness during 1996, he was disciplined all the way through to discharge in 1997 after Respondent learned of his union activity. Cole admitted that he did engage in the misconduct alleged in the various corrective action reports and discharge documents. However, a question remains as to whether Respondent treated Cole differently than other employees and if so, was that disparate treatment motivated by Respondent's union animus.

Tollie Graves had some 17 writeups beginning on January 12, 1994 and extending up to his discharge. Twelve of those writeups occurred before June 1996 and seven occurred before any union organizing activity. On August 12, 1996, Dale Watson made a note in Graves' file stating he had a formal discussion with Tollie Graves about the OS&D shipments charged – shortage & damage charged to Graves. No other notation appeared in Graves' file until April 7, 1997. At that time Graves was awarded a warning by Dale Watson for inefficiency. On May 20, 1997 Dale Watson awarded Graves a final warning and 3-day suspension for inefficiency. Then, on May 28, 1997, Graves was awarded counseling by Dale Watson for inefficiency and 18 shortages and 11 damages. The next corrective action report in Graves' file is also signed by Dale Watson, dated October 28, 1997, and is for inefficiency and hazardous material data not signed on the trailer diagram. However, written across that corrective action report is "Notes Not a Write-up." (R Exh. 42). Graves testified that he was not shown the October 28 corrective action report. He was called in, questioned, then sent back to work. Later that day, Graves was suspended. Subsequently he was discharged.

In consideration of whether Graves or Cole was treated differently than other employees, I have measured their treatment against Respondent's standard procedure as outlined in the

¹⁵ As shown herein Assistant Terminal Manager Eastman testified that it was Respondent's policy to discount and not consider offenses that occurred before he came to Memphis in June 1996. Additionally, it was Respondent's policy that offenses more than 1 year old were not considered for progressive discipline purposes.

testimony of Assistant Terminal Manager Michael Eastman for similar offenses during a 1-year period. Eastman started that procedure after he came on board in June 1996. The progressive discipline outlined by Eastman included (1) counseling, (2) warning, (3) final warning/suspension, and (4) discharge.

There was evidence of disparate treatment.¹⁶ On May 14, 1997, Dale Watson¹⁷ submitted a report (GC Exh. 105) that employee Kirk Mason failed to follow freight handling techniques and unloading procedures and that there had been a claim for damages of \$498.67 because of damages to freight unloaded by Mason. That report (not a corrective action report) was described as providing training in claims prevention. Watson wrote on that report that Mason was responsible for 13 shortages and 20 damages since April 1, 1997. On May 14, 1997, Dale Watson submitted written report (not on a corrective action report form) that employee Nathan Bins had unloaded doors and there was a claim for damages of \$1,114.70. The report shows that Bins was advised that it is his responsibility to follow Overnight freight handling techniques and unloading procedures and the report was an opportunity to train Bins concerning his responsibilities (GC Exh. 102). As shown above, Tollie Graves received an April 7, 1997, warning for inefficiency even though Graves had nothing in his record since August 12, 1996. Marcus Cole was suspended and given a final warning on April 22, 1997. Before that date Cole had received an April 7 counseling that was changed to a warning because Cole had allegedly received corrective action reports that predated the institution of the new policy when Michael Eastman came on board in June 1996.

Employee Harry Edwards received 38 corrective action reports or other written reports between February 18, 1994 and January 27, 1998. Six of those reports were dated after Michael Eastman came on board in June 1996 and several were dated after May 1997. On May 2, 1997, Dale Watson issued a warning to Edwards for inefficiency and apathy. That report noted that Edwards had been charged with 6 shortages in April 1997. On June 17, 1997 Dale Watson issued another warning to Edwards for inefficiency and showed that Edwards has failed to follow the standard operating procedures. On October 2, 1997, Dale Watson issued a third warning that year to Edwards for inefficiency (apathy) and failure to follow basic unloading procedures. On January 8, and 27, 1998, Edwards received a counseling and another warning through corrective action reports. In the 1 year period beginning on May 2, 1997, Harry Edwards received one counseling and four warnings without being suspended or discharged.

Verdell Hayes received several writeups (approximately 22) beginning in January 1994. Hayes received nine writeups beginning in June 1996. He received counseling signed by Dale Watson on June 2, 1996 for four shortages and three damages to freight. Watson issued another counseling to Hayes on July

22, 1996 for inefficiency in loading. Watson again counseled Hayes on December 4, 1996 for inefficiency causing 6 shortages and 7 damages. On April 4, 1997, Hayes received a warning from Dale Watson for inefficiency. That load included hazardous material and the corrective action report noted the metal pails were crushed and appeared to be leaking. Watson issued a May 7, 1997, final warning to Hayes for inefficiency and failure to list hazardous material on the trailer diagram. That corrective action report shows that it is "VOID 05/13/97." On May 12, 1997, Watson issue another final warning to Hayes for 4 shortages and that corrective action report was also marked "VOID" and dated "05/13/97." On May 28, 1997, Hayes was counseled for inefficiency and 11 shortages and 9 damages. On June 6, 1997, Hayes was awarded another counseling for inefficiency. He also received a warning on June 6, 1997 for inefficiency (misload). On September 11, 1997, Hayes received another warning for inefficiency (misload). Therefore, during the one year from July 22, 1996 until June 6, 1997, Hayes was awarded four counselings, three warnings and three final warnings for inefficiency. During the 1-year period from December 4, 1996 Hayes received three counselings, three warnings and two final warnings but was not discharged.

Tyrone Lewis received 8 writeups between February 11, 1996 and September 1997. Beginning in June 1996 Lewis received 5 writeups. On June 2, 1996 Lewis received counseling from Dale Watson for 4 shortages and 7 damages during a 10-day period. Lewis received a corrective action report dated July 3, 1996, for misload. That corrective action report did not show whether it was a counseling, warning or what. On July 19, 1996 Dale Watson issued counseling to Lewis for inefficiency and improper use of forklift causing damage. Lewis received another counseling on May 12, 1997 for inefficiency and overall work performance. On September 4, 1997, Lewis received another counseling for inefficiency and failure to count freight. That evidence shows, among other things, that Tyrone Lewis received two counselings for similar offenses during less than 5 months without receiving a warning, a suspension or a discharge.

The above evidence established that Respondent treated known union advocates Tollie Graves and Marcus Cole in a disparate manner. The next question is one of animus. Was Respondent motivated to treat Graves or Cole differently because of its union animus. In that regard I have considered Respondent's animus, the timing of Cole and Graves' discipline, Respondent's knowledge of their union activities and the disparate treatment of Graves and Cole, in finding that Respondent was motivated by its union animus in its actions against Tollie Graves and Marcus Cole. Respondent argued that General Counsel failed to show why it selected Graves and Cole for discipline when more obvious union supporters remain employed by Respondent. However, that is not a standard that General Counsel must meet. It is not necessary to show that an employer punished the most vocal union advocates in order to show that the employer was motivated to punish some employee(s) because of union activity.

I have also considered whether Respondent would have disciplined and discharged Marcus Cole in the absence of protected activity. *Manno Electric, Inc.*, 321 NLRB 1 fn. 12

¹⁶ Respondent submitted evidence showing that its procedure for disciplining employees changed when Michael Eastman came on board in June 1996. Therefore, I have carefully examined disciplinary documents and other reports dated on and after June 1996.

¹⁷ Dale Watson also signed Cole's March 14, 1997, and April 7, 1997 corrective action reports.

(1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Respondent failed to show that it would have taken action against Graves and Cole in the absence of union activity. Occasionally, other employees were disciplined for offenses similar to Graves and Cole. However, as shown above, on many other occasions Respondent imposed milder disciplinary measures for offenses similar to those committed by Tollie Graves and Marcus Cole. Graves had worked for Respondent for 5 years. Cole had worked for Respondent since 1994.

Tollie Graves received a 5-year pin and was complemented on his work in October 1997. At that time he had a history of disciplinary actions. Before he received his 5-year pin, Graves had received a total of one notation to file on August 12, 1996; a warning on April 7, 1997; a final warning and 3-day suspension on May 20; and counseling on May 28, 1997. During the 1 year period before his November 3, 1997, discharge, Graves received the April 7 warning, the May 20 final warning and the May 28 counseling. As shown herein, Assistant Terminal Manager Eastman instituted a practice of progressive discipline for similar offenses when he came on board in June 1996. That progressive disciplinary policy called for disciplinary actions of (1) counseling, (2) warning, (3) final warning and suspension, and (4) discharge. Graves did not progress from counseling to warning to final warning, then discharge. Instead, the disciplinary action he received immediately before his discharge was a counseling.

Marcus Cole received no discipline similar to his 1997 corrective action reports, at any time in 1996. In 1997 Cole was counseled on his first offense and a counseling changed to a warning on the second offense. His supervisor used 1994 and 1995 offenses from Cole's record. As shown above Cole was allegedly subject to the progressive discipline policy instituted by Michael Eastman in 1996. Eastman decided that no disciplinary action would be considered for progressive disciplinary purposes if the action predated his coming on board in June 1996. Additionally, only similar disciplinary actions within the last year before any progressive discipline would be considered. However, as to Marcus Cole, his supervisor ignored Eastman's policy and used disciplinary actions dated both before Eastman came on board and more than 1 year old, in changing a counseling to a warning. Cole then received a final warning and suspension for his third similar offense in 1997 and was discharged after his fourth similar offense. Although it was Respondent's announced policy to discharge on the fourth similar offense, the record shows that policy was oftentimes ignored.

In view of the above and the full record, I find that neither Tollie Graves nor Marcus Cole would have been discharged in the absence of their protected union activity. The record shows that Graves and Cole were discharged in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Overnite Transportation Company, is an employer engaged in commerce within the meaning of section 2(6) and (7) of the Act.

2. Teamsters Local 667, Affiliated With the International Brotherhood of Teamsters is a labor organizations within the meaning of section 2(5) of the Act.

3. Respondent by threatening its employee with reduced hours because the employees voted in favor of the Union as their exclusive collective bargaining representative, engaged in conduct in violation of section 8(a)(1) of the Act.

4. Respondent by discharging its employees Robert Crawford, Tollie Graves and Marcus Cole and by reducing the hours of employee Horace Quinn, because of its employees' union activities engaged in conduct in violation of section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of section 2(6), (7) and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally discharged Robert Crawford, Marcus Cole and Tollie Graves in violation of sections of the Act, I shall order Respondent to offer those employees immediate and full employment to their former positions or, if those positions no longer exist, to substantially equivalent positions. I further order Respondent to make those employees and Horace Quinn, whom I find was illegally deprived of work hours, whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1573 (1987).

Upon the foregoing findings, conclusions of law and the entire record, and pursuant to section 10(c) of the Act, I issue the following recommended:

ORDER¹⁸

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, Adams Wholesalers, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Threatening its employees with reduction in work hours because of the employees vote in favor of the Teamsters Local 667, Affiliated with the International Brotherhood of Teamsters.

(b) Disciplining, suspending and discharging its employees because of their support of the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

¹⁸ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of this Order, offer immediate and full employment to Robert Crawford, Marcus Cole and Tollie Graves to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and Horace Quinn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, suspensions and discharges of Robert Crawford, Marcus Cole and Tollie Graves and illegally reduced the hours of Horace Quinn, and within 3 days thereafter notify those employees in writing that this has been done and that the warnings and discharges will not be used against any of them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 11, a sworn certification of a respon-

sible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. November 13, 1998

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employee with reduction in their hours of work, because our employees vote in favor of Teamsters Local 667, Affiliated with the International Brotherhood of Teamsters or any other labor organization.

WE WILL NOT discipline, suspend or discharge our employees because of their support of the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights guaranteed them by section 7 of the National Labor Relations Act, as amended.

WE WILL offer immediate and full employment to Robert Crawford, Marcus Cole and Tollie Graves to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Crawford, Marcus Cole, Tollie Graves and Horace Quinn whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest.

OVERNITE TRANSPORTATION COMPANY

¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."